No. 79-1538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CECIL D. ANDRUS, Secretary of the Interior, - Appellant

versus

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., Et Al., - Appellees

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY PIKE COUNTY, KENTUCKY

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QUESTION PRESENTED

Whether the provisions of the Surface Mining Control and Reclamation Act of 1977, Section 515(b) and (d), 30 U.S.C. §1265(b) and (d) (1979), requiring mined land to be restored to its approximate original contour with all highwalls eliminated is violative of the tenth amendment to the United States Constitution.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES' POSITION BY PIKE COUNTY, KENTUCKY

INTEREST OF AMICUS CURIAE

Pike County is a political subdivision of the State of Kentucky. The City of Pikeville is the county seat and major urban center.

The County and the incorporated municipalities provide their citizens roads, streets and bridges, public sewer and water services through municipal agencies and public water districts, refuse collection and disposal, police and fire protection, parks and recreational facilities.

Planning and zoning authority for all areas of the county is exercised by the Pikeville-Elkhorn City-Pike

County Planning Commission. Zoning is enforced in all areas of the county. Subdivision regulations are enforced inside the City of Pikeville and five miles beyond the city limits. Municipal building and housing codes are enforced in the incorporated areas of the county. Ninety-four units of public housing are provided by Pikeville and the County.

The 1977-78 budget for Pike County was $1.2 million, exclusive of federal revenue sharing funds, which came from local property tax levies and turned back portions of the State severance tax from coal mined in the county.

Pike County occupies the easternmost tip of the State of Kentucky and lies wholly within the Appalachian coal fields. Entirely mountainous in topography, over 75% of the county's surface is mountain slope and the remainder lies in the floodplain areas of the Big Sandy River and its tributaries. The County, in 1977-78, was Kentucky's largest coal producing county. The County produced nearly 20 million tons in 1978-79 worth more than $500 million on which nearly $26 million in severance taxes were paid.

Pike County's economy, employment base and tax revenues are solely dependent upon coal mining. The type, quality and level of public services are thus directly dependent on coal mining. County land use policies traditionally reflect the needs of its coal economy and depend upon the local coal industry for excavation, cut and fill, stream chanelization and much rural road construction. Being adversely impacted by the direct and indirect efforts of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. §§1201 *et seq.* [hereinafter "the Act"], the County wishes its views on the constitutionality of the Act under the tenth amendment to be advanced in support of Appellees.

SUMMARY OF ARGUMENT

The Approximate Original Contour Requirement of the Act Is Unconstitutional Under the *Usery* Rule as Applied

The tenth amendment establishes a constitutional immunity for the states against the federal government and thus reflects the dual sovereignty structure of our Constitution. This immunity prevails over commerce clause legislation to the extent the latter would invade a state's freedom to structure integral operations regarding their traditional governmental functions. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). Thus Congress has no power under the commerce clause to force, displace or penalize states or their political subdivisions regarding their important traditional affairs, whether or not the subject matter is in interstate commerce. This case presents the question of whether the Act as applied in Appalachian counties does have such a displacing effect.

A. The Act Forces the State and County to Reverse Their Land Use Policies Because of the Approximate Original Contour Requirement or Have Their Policies Preempted

Federal categorical regulatory programs which are backed up by the threat of federal preemption—unlike categorical assistance programs—are inherently "coercive." The fact that the Act does not directly command state officials to do or not to do anything does not ameliorate its inherent coercion where the threat is to preempt state control over its lands. Kentucky delegates to its counties control over land uses within their boundaries and would not require, but for the Act, that mined land be restored to its

approximate original contour [hereinafter "AOC"] in deference to the counties' authority, needs and desires for flat, developable land. The 1980 Kentucky General Assembly was coerced by the Act to adopt post-effective statutes changing its land use policy.

B. The Approximate Original Contour Requirement Directly Displaces State Land Use Policy

There is a direct conflict between the state and federal land use policies regarding AOC, a conflict which Congress intended and wrote into the Act in the form of Sections 515(b)(3) and 515(c), (d) and (e), 30 U.S.C. §1265(b)(3), (c), (d) and (e) (1979). These AOC provisions, with their inflexible requirement that all highwalls be covered in all postmining circumstances, as applied in Appalachia, permit no meaningful variances from AOC even for valid alternative postmining land use purposes. Further, the Secretary of the Interior [hereinafter "the Secretary"] has interpreted the Act and taken enforcement actions indicating that meaningful variances will not be available under the permanent program.

C. The Approximate Original Contour Requirement Adversely Affects Pike County's Integral Operations Regarding Governmental Functions

The intended and applied effect of the AOC provisions directly affects Pike County's land use control authority and indirectly affects its governmental structure and operations regarding public services and facilities, housing and private commercial development, revenues, and its long-range economic development plans and prospects. Pike County's traditional reliance on private coal industry ex-

cavation activities to create level, developable land for itself and private surface owners has been and will continue to be defeated completely by the AOC requirement of the Act as applied in Appalachia.

ARGUMENT

The Approximate Original Contour Requirement of the Act Is Unconstitutional Under the *Usery* Rule as Applied

"The Tenth Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States,* 421 U. S. 542, 547 n. 7 (1975). The tenth amendment expresses the dual sovereignty structure of governmental authority embodied in our Constitution and carves out an area of state immunity from Article I exercises of power by Congress:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter. *National League of Cities* v. *Usery,* 426 U. S. 833, 845 (1976).

Modern constitutional doctrine marking the boundary between tenth amendment immunity and the commerce clause was formulated by this Court in *Usery.* The Court stated, "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental

functions, they are not within the authority granted Congress by Art. I, §8, cl. 3." *Id.* at 852. Following *Usery* it is clear that the central issue in cases presenting clashes between state immunity under the tenth amendment and Congress' powers under the commerce clause is whether the congressional legislation as applied displaces state "functions essential to separate and independent existence." *Id.* at 845.

The criteria employed in *Usery* to determine the constitutional effect of challenged wage and hour provisions of the Fair Labor Standards Act when applied to the states and their political subdivisions were: 1) the increased operating costs imposed on states, cities and counties leading to "forced relinquishment of important governmental activties" *Id.* at 847, 2) displacement of state policies regarding integral governmental operations, relating to traditional local governmental functions such "as fire prevention, police protection, sanitation, public health, and parks and recreation" *Id.* at 851;[1] and 3) direct or indirect penalization of States for structuring the conduct of their traditional affairs in a manner at variance with Congress' policy choices.

This tenth amendment immunity extends to the integral governmental functions of the states' political subdivisions, placing them also "beyond the reach of congressional power under the Commerce Clause" just as if these operations were performed by the state itself. *Id.* at 855 n. 50.

The *Usery* case stands on far broader constitutional ground than the Secretary would allow. The *Usery* rule is

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[1]This list of traditional governmental functions are examples only and "not an exhaustive catalogue of the numerous line and

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that admittedly valid commerce clause legislation, even when accompanied by formal necessary and proper clause findings, cannot be applied to displace, directly or indirectly, in any substantial matter the free exercise of state powers relating to "functions essential to separate and independent existence." *Id.* at 845. This aspect of intergovernmental immunity complements the states' absolute immunity from suit prohibited by the eleventh amendment; their immunity from direct federal taxes, *New York* v. *United States,* 326 U. S. 572 (1946); and the absolute rights conferred by Article IV §3 of the United States Constitution. It reflects the federalism considerations underlying their executive branch immunity from the Sherman Act prohibitions under *Parker* v. *Brown,* 317 U. S. 341 (1943); the protection of their judical proceedings from undue interference by the federal judiciary, *Younger* v. *Harris,* 401 U. S. 37 (1971), and respect for the economic regulatory legislative enactments. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). When commerce clause legislation clashes with tenth amendment immunities any substantial invasion by Congress of states' traditional governmental functions raises a presumption of unconstitutionality which can be overcome only by the highest national considerations.

The Secretary attempts to avoid the thrust of the tenth amendment claim here by first asserting that the Act does

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support activities . . . of state and local governments" which may be similarly protected. *Usery* at 851n.16. The case-by-case process of inclusion and exclusion has begun. Municipal operation of an airport is protected, *Amersbach* v. *City of Cleveland,* 598 F. 2d 1033 (6th Cir. 1979); operation of state oil and gas business is not. *Public Service Co. of North Carolina* v. *Federal Energy Regulatory Commission,* 587 F. 2d 716 (5th Cir. 1979).

not "coerce" the states at all because its commands concerning AOC are directed to private citizens and not state officials, and then by contending that the provisions of AOC are not directed at the states' land use powers and only incidentally affect them. He rests his case primarily on Congress' power under the commerce clause. That reliance is misplaced.[2]

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[2]Well-settled precedent and conventional analysis establishing the reach of Congress' powers under the commerce clause over private commercial conduct do not control this case. The issue here is not whether in exercise of its commerce clause powers Congress can impose such reclamation requirements on privately conducted surface coal mining operations as it deems "necessary and proper" to regulate interstate commerce or protect the environment, and thus castle this judgment behind the supremacy clause, but whether in so doing it directly or indirectly displaces state policy choices in the constitutionally protected areas or the state's traditional governmental functions, *viz,* local control over long-term land uses. Consequently, formal necessary and proper clause "findings" by Congress that the AOC requirement "affects commerce" or is in a "class of activities" affecting commerce, or a stated congressional "purpose" to "direct" surface coal mining operations into areas where "reclamation is feasible" and away from areas where it is not, and the fact—if it be one—that the AOC requirement is thus the "heart of the Act", are neither controlling nor even particularly relevant. To the contrary, the tenth amendment immunity issue must be first resolved before the conventional commerce clause-supremacy clause issues can arise at all. Constitutional principles applicable to the scope of Congress' power to regulate commerce do not decide and bear only peripherally on the scope of the tenth amendment immunity. Congress could not bind this court directly by "finding" or "declaring" that AOC or its inflexible "highwall" requirements do not infringe on tenth amendment reserved powers, nor can it do so indirectly by "finding" that uncovered highwalls "affect commerce" and thus (impliedly) do not infringe upon the tenth amendment powers. The constitutional test of the validity of the impact of Congressional commerce clause legislation which impacts the tenth amendment

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A. The Act Forces the State and County to Reverse Their Land Use Policies Because of the Approximate Original Contour Requirement or Have Their Policies Preempted

Appellants seek to distinguish this case from the *Usery* rule by asserting that the Act does not coerce the states because its provisions are directed not to "States qua States," but only to the actions of private citizens. That cosmetic feature of the Act does not take the Act out from under the *Usery* rule nor the broader constitutional principes on which *Usery* rests. Commerce clause regulatory legislation backed by the threat of federal preemption of traditional areas of state control—the categorical regulatory program—stands on altogether different constitutional footings than the taxing and spending clause categorical assistance programs.

If "coercion" is required in these "categorical regulatory" programs at all, the Act is clearly coercive. More accurately, all federal categorical regulatory programs are inherently coercive because they rest on the threat of federal preemption.[8]

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immunities is not only that the legislation must have a "rational basis" under the necessary and proper clause but the legislation must also survive the more stringent arbitrariness principle of the fifth amendment. *Usery* at 841. Resolution of the tenth amendment issue in this case is controlled by the constitutional principles, criteria and reasoning of *McCulloch* v. *Maryland,* 17 U. S. (4 Wheat.) 316 (1819); *National Association of Cities* v. *Usery,* 426 U. S. 833 (1976); *New York* v. *United States,* 326 U. S. 572 (1946); *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514 (1926); and *Lane County* v. *Oregon,* 74 U. S. (7 Wall.) 71 (1869); and not by those of *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1 (1824); *United States* v. *Darby,* 312 U. S. 100 (1941); *Wickard* v. *Filburn,* 317 U. S. 111 (1942); *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241 (1964); and *Perez* v. *United States,* 402 U. S. 146 (1971).

The applicable principles here do not rest on the mere fortuity that in *Usery* the challenged FLSA amendments were coercive because expressly directed at state and local governmental officials as employers implementing state policy choices regarding public employees' wage levels and hours of work. This Court made clear that the constitutional vice in *Usery* was not the direct federal commands to state officials, and not merely the monetary costs imposed on the states directly by those commands, but was instead the consequent "forced relinquishment" of state prerogatives. If the *form* of the invasion is determinative, Congress can easily and deftly avoid all tenth amendment limitations by the simple expedient of refraining from ordering

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[3]Congress may confer on federal citizens whatever monetary benefits it chooses pursuant to its Article I §8 clause I power to tax and spend for the "general welfare" and may enlist the states without coercion to act as its agent in distributing the federal largesse through voluntarily enacted state categorical assistance programs without preempting or invading the tenth amendment powers of the state. *Steward Machine Co.* v. *Davis,* 301 U. S. 548 (1937); *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923). Categorical regulatory programs, on the other hand, rest on Congress' power to regulate the conduct of federal citizens directly through exercise of some affirmative grant in the constitution, coupled with the preemptive effect given its legislation by the supremacy clause. U.S. Const. art. VI. If voluntary participation by the states is a constitutional factor at all in categorical regulatory schemes, then the integral threat of federal preemption which must underlie these programs provides the necessary "coercion". It is clear that both a state regulatory program under Section 503, 30 U.S.C. § 1253 (1979) of the Act or a federal program under Section 504, 30 U.S.C. §1254 (1979), must enforce Section 515(b)(3) and Sections 515(c), (d) and (e), 30 U.S.C. §1265(b)(3), (c), (d) and (e) (1979), exactly as written, and unless the state program does so the subject will be preempted. §505, 30 U.S.C. 1255 (1979). This presents no "choice" at all. It is clear the State of Kentucky felt it was "coerced" by the Act. See p. 12, *infra.*

state and local officials directly to do or not to do something. This contention—the heart of the Secretary's position on this issue—was obviously rejected by this Court in *Usery*. Mr. Justice Stevens' dissent in *Usery* recites many existing examples of when federal law directly prohibits state and local officials from taking particular actions without transgressing the tenth amendment issues. *Usery* at 880. These instances of direct federal commands to state officials qua state officials are not automatically invalidated by the *Usery* rule, but the reason is not because they are not coercive but instead because they may or may not adversely affect integral governmental operations in performance of traditional state functions. *Marshal* v. *City of Sheboygan*, 577 F. 2d 1 (7th Cir. 1978).

Kentucky's strip mining law prior to the Act contained most of the elements reflected in the federal law, and, allowing for relative differences in stringency, regulated strip mining operations by substantially the same requirements as appear in Title V of the Act. Thus Kentucky regulated the method of mining operations: drainage control and the disposal of spoil, KRS 350.090 (1977); required backfilling, regrading, and revegetation, KRS 350.095-.117 (1977); and employed a permit application process, KRS 350.060 (1977); required reclamation bond, KRS 350.060 (1977); and provided administrative inspection and citation procedures to enforce these requirements, KRS 350.050 (1977).

State policy regarding the AOC requirement of the Act, however, is exactly contrary to federal policy. The Kentucky General Assembly in 1978 and 1980 amended the Kentucky statute to make it sufficiently consistent with the Act to meet the requirements of Section 503, 30 U.S.C. §1253 (1979), in order to seek "primacy" under the Act. In so

legislating, however, the 1980 Kentucky General Assembly knew it was being coerced:

> The Commonwealth of Kentucky objects particularly to the mandatory and inflexible requirement that all surface mined land must be returned to its approximate original contour with all highwalls completely covered in all circumstances . . . and if not coerced by the threatened denial of primacy by the federal office of surface mining, the State would choose to address these matters by measures of its own devising. Kentucky Acts 1980, ch. 62, preamble.

and expressly reserved the option to challenge the requirement in court.

B. The Approximate Original Contour Requirement Directly Displaces State Land Use Policy

There is a direct and necessary conflict between the express land use provisions of the Act and the land use policies of Kentucky regarding the environmental protection performance standards of both the *interim* [Section 503, 30 U.S.C. §1253 (1979)] and *permanent* [Section 504, 30 U.S.C. §1254 (1979)] programs that all highwalls created on surface mined lands be covered and the land returned to AOC. No exceptions to AOC are permitted by the Act.[4]

Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), requires *all* surface coal mining operations "as a minimum to compact . . . and grade in order to restore the approxi-

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[4]This aspect of explicit and direct land use control in the Act distinguishes it from other federal environmental protection categorical regulatory schemes. Clearly, the obvious interstate impact dimensions to air and water pollution provide an adequate basis for comprehesive commerce clause legislation. In contrast with

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mate original contour of the land *with all highwalls, . . . eliminated*". (Emphasis added.)[5]

This AOC concept of the Act embodies two distinct and separate requirements:

1) the "configuration" requirement that the mined area must be backfilled and graded so that it "closely resembles" the pre-mining configuration of the land;
2) the "highwall" requirement that "all highwalls [must be] eliminated."[6]

Congress deliberately chose this direct displacement, there was nothing "incidental" about it. H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 106 (1977).

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the Act, however, the Clean Air Act, 42 U.S.C. §1857 *et seq.*, exhaustively regulating emissions of air contaminants, contains no direct federal land use requirements or prohibitions; and the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, contains no direct federal land use provisions. Even the federal Coastal Zone Management Act, 16 U.S.C. §1452 *et seq.*, provides that federally permitted activities effecting land use in the coastal zone must comply with the State approved plan 16 U.S.C. §1456 (3)(a).

[5]The definition of "approximate original contour" (AOC) in Section 701 (2), 30 U.S.C. §1291(2) (1979), is: "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, *with all highwalls and spoil piles eliminated. . . .*" (Emphasis added.)

[6]The term "highwalls" is not defined in the Act. The Secretary's regulations define the word as "the face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities." 30 CFR §701.5 (1979).

The Secretary asserts by way of justification for AOC that because there are such statutory variances available the Act provides "flexibility" and thereby avoids unfairness or arbitrariness. These general assertions are misleading because they are essentially inaccurate. Upon examination in light of the facts and the Secretary's regulations, statutory variances dwindle to nonexistence in the mountainous counties of Appalachia.

A variance from the "configuration" requirement is provided by Section 515(c), 30 U.S.C. §1265(c) (1979), for mountaintop removal mining operations, and by Sections 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), for contour mining operations on "steep slopes".[7] These variances theoretically permit the mined land to be left flat or gently rolling for approved postmining land uses.

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[7]Steep slopes are defined by the Act as those "above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate or other characteristics of a region or state". §515(d)(4), 30 U.S.C. §1265(d)(4) (1979).

This distinction between steep and non-steep slopes for purposes of authorizing a variance from the configuration aspect of the AOC requirement is irrational if the requirement is intended as an environmental protection measure. There would seem to be more need and less danger to public health, safety and the environment from landslides, sedimentation and erosion—and thus ample justification—for a variance from AOC for non-steep slopes where such occurrences would be rare, and just the contrary for steep slopes. As if acknowledging this anomally the Secretary's regulations define "steep slopes" in the statutory language, 30 CFR §701.5 (1979), (or such lesser slope . . . region or state) and his official comments coyly intimate that the qualifying phrase permits the regulatory authority to classify slopes *less* than twenty degrees as "steep" for purposes of broadening the Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variance. 44 Fed. Reg. 15084 (1979).

In reality, however, there is no meaningful variance from the "configuration" requirement for contour mining on the steep slopes in Pike County despite theoretical availability in the Act because of the absolute "highwall elimination" requirement.

There are *no* statutory variances from the "highwall" requirement. No highwalls remain in mountaintop removal operations, Section 515(c)(2), 30 U.S.C. §1265(c)(2) (1979), 30 CFR §785.14(b) (1979); but highwalls must be eliminated in all contour mining operations on steep slopes, Section 515 (d)(2) and (e)(1), 30 U.S.C. §1265(d)(2) and (e)(1) (1979); 30 CFR §785.16 (1979). The Secretary takes the position that:

> The intention of the Act was not to provide loopholes by which operations might be conducted without eliminating the highwall. The variance provision permits the operator to regrade the (sic) effected area to a steeper angle than the original topography; however, the stability of the backfilled material must be assured and the highwall must be eliminated by backfilling or reduction. OSM believes that the drafters of Section 515(e)(2) meant what they wrote, when they provided that the variance would be from "approximate original contour," and not from the highwall covering requirement, which is a separate requirement of Section 515(d)(2) of the Act. 44 Fed. Reg. 15084 (1979).

See also 30 CFR §826.15 (1979) and the Secretary's official comment thereto at 44 Fed. Reg. 15291 (1979).

The "highwall" requirement of AOC effectively forecloses in Pike County, Kentucky, all possible application of the Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variances for alternative postmining land uses. The geophysical facts foreclose configuration variances if

highwalls must be covered in all instances. The angle of repose for spoil material in Pike County (which are predominantly sandstone and shale composition) even when mechanically compacted, is both physically and legally a fifty-percent slope [1v:2h (50 percent) plus a minimum static safety factor of not more than 1.3]. 30 CFR §816.102 (b) (1979) and 30 CFR §816.104(b)(2) (1979) (thin overburden); 30 CFR §826.12(b) (1979) (performance standards for steep slopes); 30 CFR §826.15(a) (1979) (limited variances for contour mining of steep slopes); and 30 CFR §817.102(a)(2) (1979) (underground mining). A normal height highwall in Pike County (40 to 90 feet) covered by a fifty-percent slope backfill will effectively cover 50 to 80 percent of the surface of a normal width contour mining bench in Pike County (60 to 120 feet wide) thereby reducing the potential flat land remaining for postmining land use purposes to a narrow (15 to 30 feet wide) curving, strip extending around a mountain contour for 1500 to 5000 linear feet. A theoretical statutory variance from the "configuration" aspect of AOC is, practically speaking, unavailable in Pike County, Kentucky, in light of the *de facto* "configuration" effect of the "highwall elimination" requirement, from which there is no variance possible.

All surface coal mining in Pike County is done on steep, rough, undeveloped mountain land, some previously mined, not suitable in its original configuration for any public or economic use other than mining, or perhaps, forestry. Left flat after mining it is suitable for agricultural uses in remote areas, and for public or economic uses when located near urbanized areas.[8]

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[8]The only authorized postmining land uses for which "configuration" variances may be granted are "industrial, commercial,

(Footnote continued on next page)

Variances from the configuration requirement of AOC in contour mining operations on steep slopes cannot be granted unless "the watershed control of the area is improved" Section 515(e)(1) and (e)(3)(C), 30 U.S.C. §1265(e)(1) and (e)(3)(C) (1979). The administrative interpretation of this requirement is that the postmining land use must affirmatively reduce total suspended solids and reduce flood hazards within the watershed by reducing total flow as compared to the pre-mining hydrologic situation. 30 CFR §785.16(c)(4) (1979).

Variances in mountaintop removal operations must be predicated upon authorized postmining land use plans and

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agricultural, residential or public facility (including recreational facilities)" for mountaintop removal operations, Section 515(c)(2), 30 U.S.C. §1265(c)(2) (1979); and for "industrial, commercial, residential or public facilities (including recreational facilities)" for contour mining operations on steep slopes under Section 515(d)(2), 30 U.S.C. §1265(d)(2) (1979). There is no explanation or justification given in the Act or its legislative history for expressly authorizing a variance for an agricultural postmining land use in mountaintop removal mining operations but not in contour mining operations on steep slopes. The postmining land use potential is the same in both mining circumstances, and the language, structure and requirements of Sections 515(c), (d) and (e), 30 U.S.C. §1265(c), (d) and (e) (1979), are so similar as to suggest that the omission of "agricultural" from the list of authorized land uses of Section 515(e)(3), 30 U.S.C. §1265(e)(3) (1979), is either the result of a typographical error or Congressional inadvertence. Whether deliberate or otherwise, the distinction is irrational. In Pike County the omission is crucial because contour mining on steep slopes is virtually the only feasible method available, and agriculture is the most feasible alternative post-mining land use. The Secretary has nevertheless rigorously sutured the distinction into his regulations. Compare 30 CFR §785.14(c)(1) (1979) (mountaintop removal), with 30 CFR §785.16(c)(1) (1979) (contour mining on steep slopes), and 30 CFR §816.133 (1979) (postmining land uses).

"appropriate assurances" regarding, *inter alia*, "compatibility with adjacent land uses", "expected need and market", "investment in necessary public facilities", private financial capability for completion and supporting commitments from public agencies. Section 515(c)(3)(B), 30 U.S.C. §1265(c)(3)(B) (1979). No such statutory requirements (regarding "appropriate assurances" for compatibility, economic feasibility, financial commitments, etc.) are expressed in the Act for variances to support postmining land uses in contour mining operations.

The relatively small size of normal contour mining permit areas in Pike County, together with the fact that outcrop coal deposits suitable for extraction by "steep slope" mining methods are situated throughout the county miles from any source of water, sewer or other "public facilities", dictates that Section 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variances for "industrial, commercial, residential or public use (including recreational facilities)" postmining land uses are not available in Pike County. The Secretary's savage restriction by administrative interpretation of already narrow statutory variances belies his assertions here that variances soften the impact of the AOC requirement.[9]

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[9]Section 711, 30 U.S.C. §1301 (1979), empowers the Secretary to "authorize departures in individual cases on an experimental basis from the environmental protection performance standards" of Section 515, 30 U.S.C. §1265 (1979), and 516, 30 U.S.C. §1266 (1979), "in order to allow . . . post-mining land use for industrial, commercial, residential, or public use (including recreation facilities. . . ." These narrow "experimental practices" exemptions must provide environmental protection to the land equal to the normal requirements, must not be larger or more numerous than necessary to determine "the effectiveness or economic feasibility" of the experimental practice, and must meet

(Footnote continued on next page)

The Secretary's enforcement actions under the interim program indicate clearly the effect of his permanent program regulations regarding the Section 515(b)(3), 30 U.S.C. §1265(b)(3) (1979), highwall requirement in Sections 515(d) and (e), 30 U.S.C. §1265(d) and (e) (1979), variance situations. In *Tollage Creek Elkhorn Mining Co.*, IBSMA 80-32, 2 IBSMA 341, United States Department of the Interior, Office of Hearings and Appeals (Nov. 24, 1980), the Interior Board of Surface Mining Appeals held that the Act and regulations compelled it to uphold an OSM notice of violation issued to Tollage Creek Elkhorn Mining Co. for failure to cover highwalls left uncovered as portions of an access road to a proposed commercial tree farm in Pike County for which Tollage Creek had been formally granted a postmining land use variance by the

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the minimum standards of the Act for public health and safety. The legislative history makes abundantly clear that Congress intended the "experimental practices" exemption to be available for departures from the AOC requirement for postmining land uses. While the Secretary has granted a few Section 711, 30 U.S.C. §1301 (1979), exemptions from some of the prescribed mining performance standards, he has not granted any "experimental practices" reclamation exemptions for departures from the "highwall" aspect of the AOC requirement.

OSM has also declined to honor the Kentucky "on-site construction exemption" which exempts from the full permit and performance standards of the interim State surface mining law *bona fide* construction excavation which incidentally encounters coal. *James Moore*, IBSMA 79-10, 1 IBSMA 216, United States Department of the Interior, Office of Hearings and Appeals (July 20, 1979). The permanent program regulations further severely restrict the Section 528(3), 30 U.S.C. §1278(3) (1979), exemption for "the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction". 30 CFR Part 707 (1979).

State regulatory agency. The uncontradicted proof was that the access road and exposed highwalls were completely safe, well engineered and would cause absolutely no environmental harm whatsoever, and the Administrative Law Judge had so found. He held, however, that he was bound by the Act and regulations to require that all highwalls in all circumstances be eliminated. The Board on appeal reluctantly affirmed, noting:

> It is with difficulty that we have reached the result in this case. Commonsense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation herein, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid backfilling requirement. Apparently, it was not. Clearly, it did not. We are constrained to affirm the Chief Administrative Law Judge. *Id.* at 352.

C. The Approximate Original Contour Requirement Adversely Affects Pike County's Integral Governmental Operations of Traditional Governmental Functions

The thrust of the *Usery* rule is that commerce clause legislation is unconstitutional as applied where the *effect* of the federal legislation displaces "state choices as to how state governmental operations should be structured" or "force the States to remake such choices themselves" *Usery* at 853 (declining to overrule *Fry* v. *United States,* 421 U. S. 542 (1975) on this ground). The record in this case is replete with examples of the precise effect of the AOC requirement on counties in Southwest Virginia, and it similarly, directly and immediately displaces Pike County's land use control authority regarding the configuration of

land for purposes of residential housing development, commercial development and the construction of public facilities.

A "traditional governmental function" of States is control over the use of land within their boundaries.[10] This is not disputed.

In Kentucky the land use control power is delegated by the State to the counties and cities, KRS 100.201 (1971). These powers may be exercised by cities, counties or regional planning units, KRS 100.113 (1971); with planning commissions, KRS 100.133 (1971), appointed by mayors and county judges. KRS 100.141 (1971). A comprehensive plan is required, KRS 100.183-191 (1971); and the units may exercise the power to zone, KRS 100.203 (1971); regulate subdivisions, KRS 120.273-283 (1971); and require construction permits to insure compliance, KRS 100.303 (1971). Pike County has exercised this delegated power by establishing a joint planning commission, comprehensive plan, and a zoning ordinance for Pikeville and for an area five miles outside its municipal boundaries.

The State of Kentucky through its own administrative agency regulates the temporary land uses of surface coal mining operations in the interest of environmental protection and thereby prescribes the attendant temporary land

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[10]This Court noted in *Warth* v. *Seldin*, 422 U. S. 490, 508 n. 18 (1975), that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities". How essential to the separate and independent existence is suggested by the range of permissible objectives sanctioned by this Court: *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (encourage industrial development); *Belle Terre* v. *Boraas*, 416 U. S. 1 (1974) (dictate the social character of neighborhoods); *Agins* v. *Tiburon*, ____ U. S. ____, 100 S. Ct. 2138 (1980) (restrict urbanization).

uses. KRS Chapter 350 (1977). Long-term land use of the mined area *after* the surface mining operation reclamation is completed is subject only to local control. Further, Kentucky's statutory reclamation requirements concerning those aspects of long-term land configuration directly prohibited by the Act—allowing highwalls to be left exposed, mountaintops and contour mining benches left flat in order to form large tracts of useable flat land in mountainous counties—represents a clear State policy choice in furtherance of county land-use needs, controls and policies. This policy choice reflects a carefully balanced State deference to the long-term social and governmental needs of Pike County and its citizens—coal operators, environmentalists and surface owners alike. Specifically, Kentucky policy would not require highwalls and benches resulting from contour mining to be covered, *inter alia,* and would allow valley hollow fills to be situated adjacent thereto in order that developable flat land may be created by surface mining in counties where it is sorely needed and public revenues are chronically short.

Pike County has already experienced and will continue to suffer from the direct and indirect effects of the Act regarding its land uses. Some examples are:

1. Commercial Development. The *Tollage Creek* variance, described *supra,* was granted by the State in order that a commercial tree farm be established in Pike County. This economic development would add jobs, tax base and taxable activities in the county. This venture has been thwarted by the rigid highwall-covering requirement. Other like proposals will be similarly forstalled reducing job potential and tax revenue.

2. Public Facilities. Pursuant to the *Kentucky Aviation System Plan,* Landrum and Brown (1977), Pike County

has undertaken to construct a new $10 million regional airport on a mountaintop situated some eleven miles north of Pikeville. The land is to be donated to the county by private owners and the site is to be prepared at no cost to the county by a private surface coal mining operation acting under a state permit. This site preparation originally was to be performed under a Kentucky "on-site construction exemption" but the decision in *James Moore,* thwarted that plan. Consequently, the county decided to proceed under an alternative postmining land use variance granted by the State during the interim program. The variance and essential access road, and thus the entire venture, like that in *Tollage Creek,* are jeopardized by the Act and the regulations promulgated pursuant thereto.

3. Housing. In Dr. C. Theodore Koebel's work, *1979 Housing Report for Kentucky,* University of Louisville Urban Studies Center (1979), he noted:

> Housing shortages most likely have started to occur in several counties in Kentucky, with severe, chronic shortages occurring in Southeast Kentucky. . . . The region as a whole had a level of housing starts between 1970-1977 that would have housed only 56 percent of the increase in households. Mobile homes accounted for more than 50 percent of the total housing production in Breathitt, Harlan, Knox, Leslie, Magoffin, Perry, and Pike counties. Even with a massive reliance on mobile homes. it is doubtful that housing production in Southeast Kentucky would have been sufficient to avoid a severe housing shortage there. *Id.* at 59.

Pike County's serious and growing housing shortage is either caused or exacerbated by the severe and chronic lack of suitable residential construction sites. Over 75%

of the surface of the county is occupied by "steep slopes", and most of the remainder is situated in floodplains of the Big Sandy River and its tributaries. The number of households grew over 25% during the period 1970-1980. *Id.* at 340. The result is heavy reliance on mobile homes to meet the housing demand. During the period 1970-1978 of the nearly 7000 housing units added to the housing stock in Pike County (599% increase) 92% were mobile homes. *Id.* at 341. At the time of the survey in 1979 there were only some 800 mobile home sites available in the county. During this same eight-year period only 503 permanent single family dwellings and 70 multi-family units were added to the Pike County housing stock. *Id.* at 341.

The single most crippling factor lying behind and contributing to the Pike County housing shortage, now and in the future, is the lack of building sites—a factor which must be overcome in the future in order to solve the problem. Practically the entire surface of Pike County is underlain with coal. Surface coal mining operations in the future could provide the vital excavation, cut and fill work necessary to create residential building sites from "steep slopes" as it has traditionally. The Act and regulations embodying the AOC requirement, together with the lack of any meaningful variances because of the highwall requirement, forestall such developments in the future. Pike County presently has over 9000 mobile homes serving as temporary housing and has an immediate need for over 12,000 permanent housing units which cannot be constructed for want of building sites out of the floodplain area.

4. County Revenue. Pike County has a coal-based local economy and its budget revenues are tied directly and indirectly to coal production. Pike County's public revenues come from federal revenue sharing, local taxes on real

property and its share of the severance taxes collected by the State on coal mined in the County. Total property tax assessments for Pike County in 1979 were approximately $1 billion, *Annual Report 1978-1979,* Kentucky Department of Revenue (Dec. 1, 1979) at A-44-45, of which some $400 million was real property. *Id.* at A-51. Three-fourths of this was residential, commercial and industrial realty and the remaining one-fourth was mineral rights and unmined coal, farms and undeveloped acreage. The County received two-thirds of its locally generated revenues for 1979 from local property taxes. *Industrial Resources, Pike County, Kentucky,* Kentucky Department of Commerce (1978) at 26.

During 1978-79 over $500 million worth of coal was produced in Pike County on which over $25 million in severance taxes were paid to the State. *Annual Report 1978-1979,* at 104. Pike County received approximately one-third of its locally generated revenues from severance tax turnback funds in 1979, which is expected to increase in future years if coal mining increases in the County. In addition, the County was significantly, if indirectly, benefitted by some $14 million funding of the State Energy Road Fund and Coal Impact Road Fund which constructed new State highways in Eastern Kentucky, including Pike County. *Id.* at 110.

There can be little doubt that the challenged provisions of the Act affect these traditional governmental functions of Pike County both now and in the future. The immediate impact of the AOC requirement would reverse State and county land use policies regarding the creation of economically developable flat land by means of surface coal mining operations, disrupt long-settled legal relationships between the State and Pike County regarding land use con-

trols and long-term land uses of surface mined land, and force relinquishments by the County of its traditional reliance on privately conducted surface coal mining activities for excavation, cut and fill work to create sites for houses, roads, airports, and other public facilities. Because of this impact Pike County must reallocate scarce county budget monies to perform this work at public expense, alter its own internal organization and augment its own work force to perform the work itself or forego the benefits which would otherwise be generated for its citizens.

To the extent the AOC requirement thwarts or inhibits private residential construction and commercial developments in the County, the County will suffer diminished property tax revenues because undeveloped hillside land will not be converted into more highly taxable land. Severance tax turnback revenues to the County will be depressed to the extent the AOC requirement inhibits surface coal mining operations in the County. These losses of revenue must be recouped by new taxes or increased tax rates on the real property tax base, or the diminution in County revenues translated into lower levels of "traditional governmental services," poorer schools and fewer public facilities.

The precise effect the rigid AOC requirement will have in application to Pike County would be more tedious than illuminating to describe. Nor is it necessary:

> We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented . . . the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe . . . [the land use policies] . . . to be [exercised] by the States in their capacities as sovereign governments. *Usery* at 852-853.

CONCLUSION

Invading directly the constitutional, social and economic base of power of the state, the AOC requirement of the Act is more destructive of dual sovereignty than the FLSA amendments struck down in *Usery*. Police power control over the private use of land within its borders lies closer to the heart of a state's separate and independent existence than does its unilateral control over the wages and hours of its employees.

Every twig in the Hofeldian "bundle of sticks" making up private ownership rights to land is created by the jurisprudence of the states, Hunt, "Federal and State Control of Land: A Synopsis," originally appearing in M. McDougal & D. Haber, *Property, Wealth, Land* 70-94 (Michie Publ. Co.) (1948); rights to land can be transferred only pursuant to the situs states' laws, *Fall* v. *Eastin,* 215 U. S. 1 (1909); *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562 (1942); and these principles predate our federal Constitution. *Johnson* v. *M'Intosh,* 21 U. S. (8 Wheat.) 543 (1823).

The dual sovereignty concept begins with the recognition that our fundamental legal rights to privately-owned land are exclusively created, shaped and protected by the states under our unique federalist system. The right to own and use land is one of these basic constitutional rights under the exclusive protective control of the states which has been consistently recognized by this Court throughout history. Mr. Justice Washington gave voice to this premise in *Corfield* v. *Coryell,* 6 Fed. Cas. 545 (No. 3230) (C.C. E.D. Pa., 1823) expounding on the privileges and immunities of State citizens included under the clause of Article IV:

> "what these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . the right of a citizen of one State . . . to take hold and dispose of property, either real or personal . . . subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." *Id.* at 547.

Even the Civil War amendments, while conferring broad new constitutional powers on the central government, did not destroy the dual sovereignty structure of our federalist government. *Slaughterhouse Cases,* 83 U. S. (16 Wall.) 36 (1872). The constitutional difference between the first and second Agricultural Adjustment Acts of the New Deal era was the attempt by Congress in the former to regulate directly the use of land. Compare *United States* v. *Butler,* 297 U. S. 1 (1930); and *Mulford* v. *Smith,* 307 U. S. 38 (1939).

The provisions of the Act before the court again assault the citadel of State sovereignty, this time in the name of environmental protection, by directly displacing the exclusive power of the states' to control the configuration and long-term uses of land within their borders. Those provisions are and should be declared unconstitutional.

Respectfully submitted,

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DATED: December 19, 1980

amicus brief

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NOS. 79-1538, 80-231 & 79-1596

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

V.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, ET AL.,
Appellees.

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
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* * *

On Appeal from the United States District Courts for the Western District of Virginia and Southern District of Indiana

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

* * *

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On Appeal From the United States District Courts for the Western District of Virginia and Southern District of Indiana

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA

* * *

In January of 1978 the Railroad Commission of Texas challenged the treatment of prime farmlands under the federal Surface Mining Control and Reclamation Act of

1977 by filing two actions which were subsequently settled on terms acceptable to the Railroad Commission. *State of Texas v. Andrus and Bergland*, Civil Action No. A-78-CA-35 (W.D. Texas); *State of Texas v. Andrus*, Civil Action No. 78-0171 (D.D.C.). Nevertheless, the Railroad Commission believes the constitutional arguments presented here by the Commonwealth of Virginia to be substantial and meritorious and respectfully urges this honorable Court to affirm the decisions of the district court.

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